

PROPOSED ORDER OF THE DEPARTMENT OF REVENUE CREATING RULES

The Wisconsin Department of Revenue proposes an order to: **create** Tax 11.07; **relating to** sales and use tax exemptions for biotechnology.

The scope statement for this rule, SS 040-11, was approved by the Governor on November 14, 2011, published in Register No. 671 on November 30, 2011, and approved by the Secretary of Revenue on December 12, 2011.

Analysis by the Department of Revenue

Statutes interpreted: s. 77.54(57), Stats.

Statutory authority: ss. 77.54(57)(a)1m. and 227.11(2)(a), Stats.

Explanation of agency authority: Section 77.54(57)(a)1m., Stats., provides: “‘Biotechnology business’ means a business, as certified by the department in the manner prescribed by the department, that is primarily engaged in the application of biotechnologies that use a living organism or parts of an organism to produce or modify products to improve plants or animals, develop microorganisms for specific uses, identify targets for small molecule pharmaceutical development, or transform biological systems into useful processes and products.”

Section 227.11(2)(a), Stats., provides “[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute...”

Related statute or rule: There are no other applicable statutes or rules.

Plain language analysis: The proposed rule prescribes the manner in which a biotechnology business will be certified. It also prescribes the manner of determining the percent needed to establish if the definition of “primarily,” which is defined as “more than 50%” under s. 77.54(57)(a)4., Stats., is met.

Summary of, and comparison with, existing or proposed federal regulation:

There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Comparison with rules in adjacent states: The department is not aware of a similar rule in an adjacent state.

Summary of factual data and analytical methodologies: The department has created this proposed rule order to comply with the statutory requirement to prescribe the manner in which a business will be certified for the sales and use tax exemptions for biotechnology under s. 77.54(57), Stats. No other data was used in the preparation of this proposed rule order or this analysis.

Analysis and supporting documents used to determine effect on small business: As explained above, this rule is created to administer Wisconsin’s sales and use tax laws. As the rule itself does not impose any significant financial or other compliance burden, the department has determined that it does not have a significant effect on small business.

Anticipated costs incurred by private sector: This rule does not have a significant fiscal effect on the private sector.

Effect on small business: This rule does not have a significant effect on small business.

Agency contact person: Please contact Dale Kleven at (608) 266-8253 or dale.kleven@revenue.wi.gov, if you have any questions regarding this rule.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown below no later than one week after the public hearing on this rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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SECTION 1. Tax 11.07 is created to read:

Tax 11.07 Property used in qualified research and property used to raise research animals. (1) GENERAL. Section 77.54(57)(b), Stats., provides exemptions for the following:

(a) Machinery and equipment, including attachments, parts, and accessories, that are sold to persons who are engaged primarily in manufacturing or biotechnology in this state and are used exclusively and directly in qualified research.

(b) Tangible personal property or an item or property under s. 77.52 (1) (b) or (c), Stats., that is sold to persons who are engaged primarily in manufacturing or biotechnology in this state, if the tangible personal property or item or property under s. 77.52 (1) (b) or (c), Stats., is consumed or destroyed or loses its identity while being used exclusively and directly in qualified research.

(c) Machines and specific processing equipment, including accessories, attachments, and parts for the machines or equipment, that are used exclusively and directly in raising animals that are sold primarily to a biotechnology business, a public or private institution of higher education, or a governmental unit for exclusive and direct use by any such entity in qualified research or manufacturing.

(d) The items listed in s. 77.54 (3m) (a) to (m), Stats., medicines, semen for artificial insemination, fuel, and electricity that are used exclusively and directly in raising animals that are sold primarily to a biotechnology business, a public or private institution of higher education, or a governmental unit for exclusive and direct use by any such entity in qualified research or manufacturing.

(2) DEFINITIONS. For purposes of the exemptions in s. 77.54 (57) (b), Stats., and sub. (1), the following definitions apply, except as specifically provided otherwise in this subsection:

(a) "Animals" has the meaning given in s. 77.54 (57) (a) 1d., Stats.

(b) "Biotechnology" has the meaning given in s. 77.54 (57) (a) 1f., Stats.

(c) "Biotechnology activities" include producing biotechnology products and performing biotechnology services.

(d) "Biotechnology business" has the meaning given in s. 77.54 (57) (a) 1m., Stats.

(e) "Biotechnology products" means tangible personal property that is produced as a result of applying biotechnology that uses living organisms or parts of an organism to produce a product which improves plants or animals or improves animal health or produce a useful product resulting from the transformation of a biological process.

(f) "Biotechnology services" means activities performed for oneself or on behalf of another person for research or product development purposes that apply biotechnologies that use living organisms or parts of an organism with the goal of producing or modifying products to improve plants or animals or improve animal health, developing microorganisms for specific uses, identifying targets for small molecule pharmaceutical development, or transforming biological systems into useful processes and products.

(g) "Engaged primarily in manufacturing or biotechnology in this state" means more than 50% of a person's activities in Wisconsin are the conduct of manufacturing activities or biotechnology activities.

(h) "Machinery" has the meaning given in s. 70.11 (27) (a) 2., Stats.

(i) "Manufacturing" has the meaning given in s. Tax 11.39 (1) and (2). "Manufacturing" includes, for purposes of the exemptions in sub. (1) (a) and (b), those activities conducted in this state that are directly associated with any manufacturing activity also conducted in this state but are outside of the scope of manufacturing described in s. Tax 11.39 (2).

(j) "In this state" has the meaning given in s. 77.51 (6), Stats.

(k) "Institution of higher education" means an accredited educational organization providing education after completion of high school, including undergraduate, graduate, and professional education.

(L) "Primarily" has the meaning given in s. 77.54 (57) (a) 4., Stats.

(m) "Qualified research" has the meaning given in s. 77.54 (57) (a) 5., Stats.

(n) "Used exclusively" has the meaning given in s. 77.54 (3) (b) 3., Stats.

(3) EXEMPTIONS FOR PROPERTY USED IN QUALIFIED RESEARCH. (a) In order for a person to claim the exemption described in sub. (1) (a) or (b), that person must be engaged primarily in manufacturing or biotechnology in this state. In addition, the exemption in sub. (1) (a) requires that the property be used exclusively and directly in qualified research and the exemption in sub. (1) (b) requires that the property or item is consumed, destroyed, or loses its identity while being used exclusively and directly in qualified research.

(b) To the extent that producing a biotechnology product constitutes manufacturing, the same activity may be classified as a biotechnology activity and a manufacturing activity for purposes of determining whether the person is engaged primarily in manufacturing or biotechnology in this state. When a person's activities in this state include one or more activities in addition to manufacturing or biotechnology, the question of which activity, if any, is the primary activity being conducted in this state by that person is answered by a consistent application of a reasonable measure of activity.

Examples 1) Company A performs research and product development services at locations in Wisconsin for its customers. This is Company A's sole activity in Wisconsin. In some cases, the services qualify as biotechnology services as defined in sub. (2)(e). Company A, using the sales price of its services as the measure of activity, determines that more than 50% of the total sales price it receives for performing all research and product development services in Wisconsin is derived from "biotechnology services."

2) Company B performs research and product development services at locations outside of Wisconsin. Company B manufactures tangible personal property at a location in Wisconsin. This is Company B's sole activity in Wisconsin. The products manufactured in Wisconsin are used by Company B in performing its research and product development activities. For purposes of the exemptions in sub. (1) (a) and (b), Company B is engaged primarily in manufacturing in Wisconsin, as manufacturing is its only activity in Wisconsin.

(c) When property or an item purchased exempt under sub. (1) (a) or (b) is used more than 5% of its total use for purposes other than exclusive and direct use in qualified research, the purchaser becomes subject to Wisconsin use tax on the purchase price of the property or item, unless another exemption applies.

Example: Company A is engaged primarily in manufacturing in Wisconsin. Company A purchases a machine that it will use directly in conducting qualified research at its manufacturing plant in Wisconsin, and purchases it exempt from Wisconsin sales tax claiming the exemption in sub. (1) (a). After completing the qualified research and having made no use of the machine other than direct use in qualified research, Company A begins using the machine exclusively and directly in its manufacturing operation, which is an exempt use under s. 77.54 (6) (a), Stats. Company A does not owe Wisconsin use tax on its purchase of the machine.

(4) EXEMPTIONS FOR RAISING ANIMALS USED IN QUALIFYING RESEARCH OR MANUFACTURING. (a) This subsection explains how a person qualifies for the exemptions under sub. (1) (c) and (d), the information certain purchasers of the animals are required to furnish to a seller of such animals, and the documentation to be kept by the seller to verify the seller qualifies for the exemptions.

(b) The exemptions in sub. (1) (c) and (d) apply to property purchased and used exclusively and directly in raising an animal or animals when more than 50% of the animal or animals raised are sold to one of the following organizations for use by such organization in qualified research or manufacturing:

1. A biotechnology business certified by the department as described in sub. (5).
2. A public or private institution of higher education as defined in sub. (2) (k).
3. A government agency.

(c) The person claiming an exemption under sub. (1) (c) or (d), shall obtain and retain information furnished to it by the organizations described in par. (b), attesting to the number of animals purchased and used by the organization in qualified research or manufacturing. Purchaser's Statement to Seller for Animals used in Qualified Research or Manufacturing, Form S-209, may be used by the purchaser for this purpose.

Note: Form S-209 is available on the department's web site at www.revenue.wi.gov.

(d) To the extent that property described in sub. (1) (c) or (d) is entirely consumed while being used exclusively and directly in raising any specific animal that is sold to an organization described in par. (b) and used exclusively and directly by such organization in qualified research or manufacturing, that property is exempt.

Example: Company A raises a special breed of rat for use in research. Company A sells 100 of these rats, all of the same age, to Company B, a biotechnology business. In general, each rat will consume the same amount of food to be raised to this age. Company B furnishes Company A with a fully completed Form S-209 indicating that 40 of these rats will be used exclusively and directly by Company B in conducting qualified research. Company A qualifies for the exemption under sub. (1) (d), with respect to 40% of the feed used in raising the 100 rats sold to Company B is exempt.

(e) To the extent that a type of property described in sub. (1) (c) or (d) is entirely consumed while being used exclusively and directly in raising any specific animal that is sold to an organization described in par. (b) and used exclusively and directly by such organization in qualified research or manufacturing, and more than 50% of such animals raised are used exclusively and directly by such organizations in qualified research or manufacturing, the exemption applies to all of the property consumed in raising all of the animals sold.

Example: Company A raises a special breed of rat for use in research. Company A sells 100 of these rats, all of the same age, to Company B, a biotechnology business. In general, each rat will consume the same amount of food to be raised to this age. Company B furnishes Company A with a fully completed Form S-209 indicating that 60 of these rats will be used exclusively and directly by Company B in conducting qualified research. Company A qualifies for the exemption under sub. (1) (d), with respect to 100% of the feed used in raising the 100 rats sold to Company B.

(f) To the extent that property described in sub. (1) (c) or (d) is not entirely consumed while being used exclusively and directly in raising any particular animal, such property is exempt only upon a showing that more than 50% of the animals raised using such property are sold to organizations described in par. (b) for exclusive and direct use by such organizations in qualified research or manufacturing.

Example: Company T raises certain animals for sale for use in research. Company A uses cages to raise these animals, one animal to a cage at any one time, and six animals per year. The cages have a life expectancy of 5 years. Company T's purchase of a cage is exempt only if more than 50% of the animals raised using the cage are sold to organizations described in par. (a) for exclusive and direct use by such an organization in qualified research or manufacturing.

(5) CERTIFICATION OF BIOTECHNOLOGY BUSINESS BY THE DEPARTMENT (a) For purposes of the exemptions in sub. (1) (c) and (d), the department is required to certify businesses as a biotechnology business. This subsection outlines the rules and procedures for a person to be certified as a biotechnology business by the department.

(b) A person is a biotechnology business when all of the following conditions are satisfied:

1. The person is engaged primarily in biotechnology. A person is engaged primarily in biotechnology for any period prescribed by the department, when, based on all facts and circumstances, more than 50% of the person's activities during that period are devoted to the conduct of biotechnology.

2. The person has received notice from the department that the person has been certified, with respect to a prescribed period determined under par. (c), that the person is a biotechnology business.

(c) The certification period under par. (b) 2. shall correspond to the person's tax year as determined for federal income tax purposes, including short years, subject to the following conditions:

1. If a person is certified by the department with respect to a previous tax year, the certification is valid for the previous tax year.

2. If a person is certified for a current tax year, the certification is valid until the expected end of the tax year unless, during such tax year the person's tax year terminates earlier than expected. When a tax year terminates earlier than expected, the certification is valid until the actual end of the tax year as determined for federal income tax purposes.

(d) A person may use a self-certification process in the manner and using a form prescribed by the department. In general, self-certification is available for past and current tax years described in par. (c), based on a determination by the person that either more than 50% of certain items of gross income for federal income tax purposes or more than 50% of certain expenses and deductions for federal income tax purposes are derived from or related to producing biotechnology products or engaging in biotechnology services. A person may be certified for its current tax year based on the person qualifying as a biotechnology business for its previous tax year.

(e) Notwithstanding any other provision in this subsection, the department may:

1. Revoke any certification granted with respect to a period under par. (c) (1) or (2), but only upon information that either the person's application for certification contained a misstatement as to the person's gross income or expenses and deductions or the person no longer qualifies as a biotechnology business.

2. Require any person seeking certification as a biotechnology business to submit additional information, as determined by the department, prior to the department granting or denying the applicant's request for certification.

3. Require any person seeking certification to be certified only with respect to its previous tax years, until the department determines otherwise.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

Initial Regulatory Flexibility Analysis

This proposed rule order does not have a significant economic impact on a substantial number of small businesses.

DEPARTMENT OF REVENUE

Dated: _____

By: _____
Richard G. Chandler
Secretary of Revenue

E:Rules/1107 Proposed Order